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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

FINJAN LLC, a Delaware Limited Liability Company.

Case No. 5:17-cv-04467-BLF (VKD)

**PLAINTIFF FINJAN LLC'S MOTION TO
PRECLUDE TRIAL TESTIMONY
RELATING TO WRITTEN
DESCRIPTION**

Plaintiff,

V.

SONICWALL, INC., a Delaware Corporation.

Date: June 24, 2021

Date: June 24, 2013
Time: 9:00 a.m.

Judge: Hon. Beth Labson Freeman

Dent: Courtroom 3, Fifth Floor

**REDACTED VERSION OF DOCUMENT FILED
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TABLE OF CONTENTS

2	I.	NOTICE OF MOTION	1
3	II.	STATEMENT OF RELIEF BEING SOUGHT AND THE ISSUE TO BE DECIDED	1
4	III.	STATEMENT OF THE RELEVANT FACTS	1
5	A.	Nature and Stage of the Case	1
6	B.	The Written Description Opinions of SonicWall's Technical Experts are Based on Alternative Claim Constructions Purportedly Drawn from Finjan's Infringement Allegations, Not the Court's Constructions	1
7	C.	At Deposition, SonicWall's Technical Experts Confirmed Their Reliance on Alternative Claim Constructions Derived From Infringement Allegations	3
8	IV.	ARGUMENT	4
9	A.	Legal Standards	4
10	B.	The Opinions' Methodology of Comparing the Patents' Disclosures to Alternative Claim Constructions Derived From Infringement Allegations is Improper Under <i>Daubert</i> and Rule 702	6
11	C.	The Opinions Are Additionally Inadmissible Under Rule 403 Because They are Non-Probatative and Would Promote Confusion About the Claim Constructions the Jury Must Apply During Fact- Finding	8
12	V.	CONCLUSION	9

TABLE OF AUTHORITIES

Page(s)	
2	Cases
3	<i>Ariad Pharms., Inc. v. Eli Lilly & Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010) (en banc).....6
4	
5	<i>Brookhill-Wilk I, LLC v. Intuitive Surgical, Inc.</i> , 334 F.3d 1294 (Fed. Cir. 2003).....7
6	
7	<i>Coleman v. Home Depot, Inc.</i> , 306 F.3d 1333 (3d Cir. 2002).....5
8	
9	<i>CytoLogix Corp. v. Ventana Medical Sys., Inc.</i> , 424 F.3d 1168 (Fed. Cir. 2005).....8, 9
10	
11	<i>Energy Trans. Grp. v. William Demant Holding A/S</i> , 697 F.3d 1342 (Fed. Cir. 2012)
12	6
13	<i>Every Penny Counts, Inc. v. American Express Co.</i> , 563 F.3d 1378 (Fed. Cir. 2009).....5, 8, 9
14	
15	<i>Koninklijke Philips Elecs. N.V. v. Cardiac Sci. Operating Co.</i> , 590 F.3d 1326 (Fed. Cir. 2010)
16	7
17	<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996).....5, 9
18	
19	<i>O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.</i> , 521 F.3d 1351 (Fed. Cir. 2008).....9
20	
21	<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....5, 7
22	
23	<i>SRI Int'l v. Matsushita Elec. Corp. of Am.</i> , 775 F.2d 1107 (Fed. Cir. 1985) (en banc).....7
24	
25	<i>Summit 6, LLC v. Samsung Elecs. Co.</i> , 802 F.3d 1283 (Fed. Cir. 2015)
26	5
27	<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2011)
28	5
29	<i>United States v. Redlightning</i> , 624 F.3d 1090 (9th Cir. 2010).....5
30	

1 **Statutes**

2 35 U.S.C. § 112, ¶ 1.....5

3 **Other Authorities**

4 Fed. R. Evid. 403.....5

5 Fed. R. Evid. 702.....4

6 Fed. R. Evid. 703.....5

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1 **I. NOTICE OF MOTION**

2 **NOTICE IS HEREBY GIVEN** that on June 24, 2021, at 9:00 a.m. PT or as soon as
 3 counsel may be heard by the Honorable Beth Labson Freeman, Plaintiff Finjan LLC (“Finjan”)
 4 will and hereby does move for an order precluding certain trial testimony from Aviel Rubin,
 5 Ph.D.; Kevin Almeroth, Ph.D.; and Patrick McDaniel, Ph.D. (together, “the SonicWall Technical
 6 Experts”).

7 **II. STATEMENT OF RELIEF BEING SOUGHT AND THE ISSUE TO BE DECIDED**

8 Finjan seeks an order precluding Drs. Rubin, Almeroth, and McDaniel from presenting at
 9 trial any opinions that any asserted patent lacks sufficient written description for its asserted
 10 claims, and/or that any asserted patent is invalid for that reason. The issue to be decided is
 11 whether the SonicWall Technical Experts’ opinions on this issue comport with controlling law
 12 requiring that the written description inquiry apply the claims as construed by the court, and not
 13 alternative constructions purportedly gleaned from infringement contentions.

14 **III. STATEMENT OF THE RELEVANT FACTS**

15 **A. Nature and Stage of the Case**

16 This is a patent case. Finjan accuses Defendant SonicWall, Inc. (“SonicWall”) with
 17 infringing eight Finjan patents. Discovery in this case closed in October 2020, and the Court has
 18 scheduled trial to begin on May 3, 2021.

19 **B. The Written Description Opinions of SonicWall’s Technical Experts are Based
 20 on Alternative Claim Constructions Purportedly Drawn from Finjan’s
 21 Infringement Allegations, Not the Court’s Constructions**

22 In September 2020, SonicWall’s counsel served expert reports from each of the SonicWall
 23 Technical Experts. Each of these reports contains opinions about the sufficiency of the written
 24 description supporting Finjan’s claims.¹ Each of these opinions applies the same basic

25 ¹ Exhibits (“Exh.”) are attached to the Declaration of Robert Courtney in Support of Finjan’s
 26 Motion to Preclude Trial Testimony Relating to Written Description. The Rubin report addressed
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1 methodology of using Finjan's infringement contentions, rather than this Court's claim
 2 constructions, as the basis for the written description analysis of each patent. The SonicWall
 3 Technical Experts' methodology has four steps:

- 4 1. Identifying an infringement contention by Finjan against a
 SonicWall product or functionality;
- 5 2. Based on Finjan's contention, forming an alternative
 construction of a claim limitation(s);
- 6 3. Reasoning that Finjan would have adopted this alternative
 construction; then
- 7 4. Stating an opinion as to whether the written description
 teaches or suggests an embodiment conforming to the
 alternative claim construction.

8 All three SonicWall Technical Experts employed this infringement-focused methodology
 9 in all their 112 analyses. *See* Exh. A at 212–40; Exh. B at 253–86; Exh. C at 128–41.

10 The Opening Rubin report's treatment of one limitation from the '408 patent represents the
 11 SonicWall technical experts' general approach. (*See* Exh. A at 212–40.) It begins by analyzing
 12 Finjan's infringement contentions. (*Id.* at 212 ("Finjan contends this claim language is met . . .
 13 .").) The Report then discusses some of the operational details of the SonicWall accused products
 14 and Finjan's infringement allegations against them. (*Id.* at 212–14.) The Report hypothesizes that
 15 one basis for those allegations might have been an alternative interpretation of the '408 claim term
 16 "an incoming stream of programming code" such that the term would cover "[REDACTED]
 17 [REDACTED].") (*Id.* at 213.) The Report assigns this hypothetical construction to
 18 Finjan, though it cites neither any filing by Finjan adopting that construction, nor the Court's
 19

20 U.S. Patents 8,225,408; 7,975,305; 7,613,926; and 6,965,968. The Almeroth report addressed
 21 U.S. Patents 6,154,844 and 8,141,154. The McDaniel report addressed U.S. Patents 8,677,494
 22 and 6,804,780. Excerpts from these reports are attached as Exhs. A, B, and C, respectively.

1 claim construction order.² (*Id.*) Finally, the Report compares its alternative construction to the
2 specification of the '408 patent to look for disclosure of the exact alleged functionality. (*Id.* at
3 213–14.) After quoting various matter from the patent, the Report opines based on those quotes
4 that a skilled artisan would not find support in the patent for the claim under this alternative,
5 hypothetical interpretation never adopted by (or even submitted to) the Court. (*Id.* at 214.)

6 This same basic approach—starting with the infringement allegations, using them to craft a
7 strawman alternative claim construction, assigning that alternative construction to Finjan, then
8 assessing the written description under that alternative construction—is in each of the SonicWall
9 Technical Experts' reports concerning written description.

C. At Deposition, SonicWall’s Technical Experts Confirmed Their Reliance on Alternative Claim Constructions Derived From Infringement Allegations

When challenged at deposition, the SonicWall Technical Experts confirmed that their analysis of written description primarily relied on Finjan's infringement contentions, and not on the Court's Claim Construction Order or the terms' ordinary meaning to one of skill in the art.

15 Dr. Rubin confirmed that under the proper construction of the claims, he was “not
16 challenging” written description. (Exh. D 50:11–18 [REDACTED])

19 [REDACTED]). He confirmed that his written
20 description opinions were based entirely on constructions that the Court has not adopted, and
21 would apply only if the Court “[REDACTED]
22 ” (*Id.* at 46:9–47:1.)

²⁵ While there are intermittent citations to the Claim Construction Order in the reports' written
²⁶ description analysis, the analysis primarily relies on Finjan's infringement contentions, and only
²⁷ secondarily (at best) on the Court's claim constructions.

1 **Dr. Almeroth** described his written description argument as a “conditional” argument, and
 2 that he was not providing a written description opinion under “the proper” interpretation of the
 3 claims. (Exh. E 62:22–63:2, 64:13–19.) His analysis was expressly “predicated based on a claims
 4 scope” that he purportedly discerned from Finjan’s “infringement allegations.” (*Id.* at 67:8–15.)

5 **Dr. McDaniel** confirmed that he—like all the SonicWall experts—was applying a
 6 different claim construction for written description than he applied to either infringement or other
 7 aspects of invalidity. (Exh. F 54:12–21 (describing how his written description discussion
 8 “[REDACTED]”).) And, like the other
 9 experts, he offered no written description opinion under the claim construction actually entered by
 10 the Court. (*Id.* at 55:16–20.)

11 **IV. ARGUMENT**

12 The opinions concerning written description in the SonicWall Technical Experts’ reports
 13 are expressly based on alternative claim constructions crafted by the SonicWall Experts from
 14 Finjan’s infringement allegations. Such methodology is improper as a matter of law, *per se*
 15 unreliable, and improper for consideration by the jury. The Court should not permit SonicWall to
 16 confuse the jury with opinion testimony based on alternative claim constructions prepared by
 17 SonicWall and never adopted by the Court or by Finjan. Because the same fundamental
 18 methodological defect applies across the written description analysis of all SonicWall Experts, the
 19 Court should enter an order precluding those experts from presenting opinions at trial concerning
 20 the sufficiency of written description for any patent-in-suit. The jury should only be presented
 21 with one set of claim constructions: those in the Court’s Claim Construction Order.

22 **A. Legal Standards**

23 **Evidentiary standards.** As the Court knows, Rule 702 bars qualified experts from
 24 presenting to the jury opinions that are not the “product of reliable principles and methods,” or
 25 where the record indicates a failure by the expert to “reliably appl[y] the principles and methods to
 26 the facts of the case.” Fed. R. Evid. 702(c), (d). Rule 703 bars experts from basing their opinions
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1 on facts or data other than those that experts in the field would “reasonably rely on.” Fed. R.
 2 Evid. 703.

3 In the Ninth Circuit, as throughout the U.S., “[t]he trial judge must perform a gatekeeping
 4 function to ensure that the expert’s proffered testimony is both reliable and relevant.” *United*
 5 *States v. Redlightning*, 624 F.3d 1090, 1111 (9th Cir. 2010). A district court “may exclude
 6 evidence that is based on unreliable principles or methods, [or] legally insufficient facts or data.”
 7 *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1295 (Fed. Cir. 2015). Where the expert,
 8 or the party proffering the expert’s testimony, is unable to “justif[y] the application of a general
 9 theory to the facts of the case,” the affected testimony should be excluded. *Uniloc USA, Inc. v.*
 10 *Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011).

11 Additionally, under Rule 403 evidence is excludable if its “probative value is substantially
 12 outweighed” by the risk of “unfair prejudice, confusing the issues, [or] misleading the jury.” Fed.
 13 R. Evid. 403; *see also Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343 (3d Cir. 2002)
 14 (“[E]vidence may be excluded if its probative value is not worth the problems that its admission
 15 may cause[.]”).

16 **Standards for claim interpretation.** The Supreme Court has long held that patent claim
 17 interpretation is an issue of law, to be resolved exclusively by the court. *Markman v. Westview*
 18 *Instruments, Inc.*, 517 U.S. 370, 372 (1996). In jury trials, the court supplies its constructions to
 19 the jury via instructions. *E.g., Every Penny Counts, Inc. v. American Express Co.*, 563 F.3d 1378,
 20 1383 (Fed. Cir. 2009) (“[T]he court’s obligation is to ensure that questions of the scope of the
 21 patent claims are not left to the jury.”) Claim interpretation is not, in any sense, a jury issue. *Id.*
 22 Courts construing patent claims give terms the meaning they would have to a person of ordinary
 23 skill in the art at the time of the invention in view of the specification and the prosecution history.
 24 *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc).

25 **Standards for assessing the sufficiency of a patent’s written description.** The Patent
 26 Act requires that each patent contain a sufficient written description “as to enable any person
 27 skilled in the art . . . to make and use the same[.]” 35 U.S.C. § 112, ¶ 1. Specifically, the

1 description must “clearly allow persons of ordinary skill in the art to recognize that the inventor
 2 invented what is claimed.” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir.
 3 2010) (en banc) (quote marks omitted). “[T]he test for sufficiency is whether the disclosure of the
 4 application relied upon reasonably conveys to those skilled in the art that the inventor had
 5 possession of the claimed subject matter as of the filing date.” *Id.* The sufficiency of written
 6 description is evaluated based on “the four corners of the specification.” *Id.* A patent satisfies the
 7 written description requirement where its specification is adequate “to support the full scope of the
 8 claims as construed [by the court].” *Energy Trans. Grp. v. William Demant Holding A/S*, 697 F.3d
 9 1342, 1350 (Fed. Cir. 2012). Fact-finders evaluating the sufficiency of a patent’s written
 10 description apply a presumption that the description is sufficient. A patent may be invalidated on
 11 written description grounds only upon clear and convincing evidence that the full scope of the
 12 claims, using the construction assigned by the court, lacks support in the written description.
 13 *Ariad*, 598 F.3d at 1354.

14 **B. The Opinions’ Methodology of Comparing the Patents’ Disclosures to
 15 Alternative Claim Constructions Derived From Infringement Allegations is
 16 Improper Under *Daubert* and Rule 702**

17 The written description opinions offered by Drs. Rubin, Almeroth, and McDaniel are
 18 inadmissible under *Daubert* due to their use of alternative claim constructions (purportedly drawn
 19 from Finjan’s infringement allegations) instead of constructions approved by the Court. That
 20 approach is improper as a matter of law, and for each of the SonicWall Experts it led to a
 21 distorted, unreliable methodology. Instead of comparing each patent’s construed claims with its
 22 description as the law requires, the SonicWall Experts compared Finjan’s infringement allegations
 23 (and hypothetical claim constructions derived therefrom) to try and find an embodiment in the
 24 patent that exactly matched what was alleged to satisfy those limitations. There is no legal support
 25 for such an approach, particularly in the context of a presentation to a jury.

26 For a written description inquiry (as for any other inquiry into the validity of a patent
 27 claim), claims are interpreted according to their ordinary meaning at the time of the invention, in
 28

1 view of the specification and the prosecution history. *Koninklijke Philips Elecs. N.V. v. Cardiac*
 2 *Sci. Operating Co.*, 590 F.3d 1326, 1336 (Fed. Cir. 2010) (“A district court must base its analysis
 3 of written description . . . on proper claim construction.”); *see also Phillips*, 415 F.3d at 1312–13.
 4 District courts typically provide that interpretation via pre-trial claim construction proceedings in
 5 which the parties are instructed to bring interpretive disputes forward and have them resolved, as
 6 was done here. (*See* Claim Constr. Order (Mar. 26, 2019), D.I. 132.) During that process, post-
 7 patent documents—such as infringement contentions—that are “not contemporaneous with the
 8 patent” and that do not help establish what claim terms meant at the time of the invention, are “not
 9 considered.” *Brookhill-Wilk I, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir.
 10 2003). For more than thirty years the Federal Circuit has specifically reminded litigants, “A claim
 11 is construed in light of the claim language, the other claims, the prior art, the prosecution history,
 12 and the specification, *not* in light of the accused device.” *SRI Int’l v. Matsushita Elec. Corp. of*
 13 *Am.*, 775 F.2d 1107, 1118 (Fed. Cir. 1985) (en banc).

14 The written description opinions here contravene such law because the opinions employ
 15 claim constructions that the SonicWall Experts did not receive from the Court, and did not derive
 16 from the specification or prosecution history. The alternative constructions on which the
 17 SonicWall Experts based their opinions were purportedly gleaned from Finjan’s infringement
 18 allegations, which post-date the patents by years. None of the SonicWall Experts contend that the
 19 infringement allegations are valid claim construction evidence, yet all of them rely on them for
 20 that purpose. Dr. Rubin confirmed that his written description opinions could apply only if the
 21 Court adopts those constructions—which it has not done. (Exh. D at 46:9–47:1.) Dr. Almeroth
 22 stated that his analysis was discerned from Finjan’s “infringement allegations,” and that he had no
 23 written description opinion under “the proper” (i.e., the Court’s) interpretation of the claims.
 24 (Exh. E 62:22–63:2, 64:13–19, 67:8–15.) Dr. McDaniel confirmed that but for considering the
 25 allegations, he had no other opinion as to written description, and was basing his opinions on
 26 “what Finjan appeared to be arguing.” (Exh. F at 54:12–21, 55:16–20.) However *SRI, Brookhill-*
 27 *Wilk I*, and *Phillips* make the SonicWall Experts’ error abundantly clear. Finjan’s infringement
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1 contentions are *not a cognizable source of evidence for claim construction*. Using Finjan’s
 2 infringement allegations as a source for alternative claim constructions is improper as a matter of
 3 law, and *per se* unreliable under *Daubert*.

4 Finjan is unaware of any authority endorsing an expert applying alternative constructions,
 5 derived on the expert’s own recognition and adopted by neither the Court nor any party, in jury
 6 testimony. The Federal Circuit has expressly reminded district courts to be vigilant against
 7 attempts to make claim construction a jury issue, which would be the ultimate effect of such
 8 testimony. *Every Penny Counts*, 563 F.3d at 1383 (Fed. Cir. 2009) (“[T]he court’s obligation is to
 9 ensure that questions of the scope of the patent claims are not left to the jury.”). And it has noted
 10 that failure to sufficiently protect the jury may be grounds for reversal. In its words, “The risk of
 11 confusing the jury is high when experts opine on claim construction before the jury[.]” *CytoLogix*
 12 *Corp. v. Ventana Medical Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005).

13 The written description opinions offered by the SonicWall Experts are fundamentally
 14 flawed in their methodology. Tendering invalidity theories based on alternative claim
 15 constructions that are (1) unendorsed by the Court, and (2) expressly derived from documents that
 16 are not cognizable claim construction evidence is improper as a matter of law and *per se* unreliable
 17 from the standpoint of expert methodology. Under *Daubert*, the Court should enter an order
 18 precluding SonicWall from offering such testimony at trial. Because it is not disputed that none of
 19 SonicWall’s experts have disclosed any written description opinions except those based on the
 20 infringement allegations (and the hypothetical claim constructions derived therefrom), the Court
 21 should order that SonicWall may not present any expert opinion at trial on written description.

22 **C. The Opinions Are Additionally Inadmissible Under Rule 403 Because They
 23 are Non-Probatative and Would Promote Confusion About the Claim
 24 Constructions the Jury Must Apply During Fact-Finding**

25 Even if the SonicWall Experts’ methodology of using alternative claim constructions
 26 rather than court-endorsed ones were permissible under *Daubert* (it is not), it would still be
 27 inadmissible due to the plain lack of probative value and clear risk of jury confusion. As to their
 28

1 probative value, it is well established that courts have the sole responsibility (and obligation) to
 2 resolve claim construction disputes. *E.g., O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521
 3 F.3d 1351, 1362 (Fed. Cir. 2008). Testimony by a SonicWall expert hypothesizing that the claim
 4 constructions might have been different than those the court has entered would not be probative of
 5 any claim or defense in the case. And as to confusion, as already noted, “the risk of confusing the
 6 jury is high when experts opine on claim construction before the jury[.]” *CytoLogix Corp. v.*
 7 *Ventana Medical Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005). Because the SonicWall
 8 Experts’ opinions use alternative constructions the Court has not endorsed, there is a significant
 9 risk that the jury would become confused as to which construction should be used in the various
 10 portions of the case. Further, presentation of these opinions would even threaten to make the jury
 11 incapable of filling out its critical fact-finding role. Because the SonicWall Experts’ opinions are
 12 based on disputed claim constructions, it would be impossible for any jury to evaluate the
 13 credibility of those opinions without evaluating the credibility of the constructions. But as already
 14 discussed, claim construction is outside the jury’s role. *E.g., Every Penny Counts*, 563 F.3d at
 15 1383. The jury would thus be unable to carry out their duty to assess credibility without at the
 16 same time exceeding their role by reviewing claim construction. This situation would be deeply
 17 unfair to Finjan, as the party seeking to maintain the Court’s constructions rather than venture into
 18 hypothetical alternate constructions.

19 It was precisely to avoid this circumstance that the Supreme Court confirmed courts’ sole
 20 responsibility for claim construction. *Markman*, 517 U.S. at 372. The Court should reaffirm that
 21 role here, and protect the jury from near-certain confusion, by rejecting SonicWall’s attempt to
 22 make claim construction a jury issue. If it does not preclude the SonicWall written description
 23 opinions under *Daubert*, it should preclude them as prejudicial and non-probative under Rule 403.

24 **V. CONCLUSION**

25 For the reasons given, Finjan respectfully moves that the Court enter an order precluding
 26 SonicWall from presenting at trial unreliable expert testimony concerning alleged insufficiency of
 27 written description for any of the asserted patents.

28

1 Dated: January 21, 2021

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20 **CERTIFICATE OF SERVICE**

21 The undersigned hereby certifies that a true and correct copy of the above and foregoing
22 document has been served on January 21, 2021, to all counsel of record who are deemed to have
23 consented to electronic service via the Court's CM/ECF system. Any other counsel of record will
24 be served by electronic mail and regular mail.

25 /s/ Robert Courtney

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